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## Court Review: Volume 41, Issue 3-4 - Balancing Act: Can Judicial Independence Coexist with Court Accountability?

Michael W. Manners

*Jackson County Circuit Court in Independence, Missouri*

Michael Buenger

*Conference of State Court Administrators*

Kevin S. Burke

Bobby B. DeLaughter

*Hinds County Circuit Court in Jackson, Mississippi*

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# Balancing Act:

## Can Judicial Independence Coexist with Court Accountability?

Michael W. Manners, Michael L. Buenger, Kevin S. Burke, Bobby B. DeLaughter, Malcolm Feeley, Michael R. McAdam, Mary Campbell McQueen, Jeffrey Rosinek, John Russonello, Roy A. Schotland, and Robert Wessels

The fifth panel discussion at the National Forum on Judicial Independence explored the intersection between judicial independence and public accountability. The discussion was led by Michael W. Manners, a circuit judge on the Jackson County Circuit Court in Independence, Missouri. Panelists were Michael L. Buenger, Missouri state court administrator, Kevin S. Burke, a district judge in Hennepin County District Court in Minneapolis, Minnesota, Bobby B. DeLaughter, a circuit judge on the Hinds County Circuit Court in Jackson, Mississippi, Malcolm Feeley, professor of law at the University of California-Berkeley, Michael R. McAdam, judge on the Kansas City (Mo.) Municipal Court, Mary Campbell McQueen, president of the National Center for State Courts, Jeffrey Rosinek, a circuit judge on the Miami-Dade County

selection plan for judges, that there's been a threat to that. Let me give you a little bit more context about that because it maybe provides context for the first question I want to ask of the panel.

The way that that controversy came about, very briefly, was this, and perhaps it's coincidental, but Missouri a few years ago had a referendum election on whether or not its citizens should be permitted to carry concealed firearms, and that referendum failed. Political times changed and last year the state legislature adopted a law allowing people in Missouri under certain circumstances to carry concealed firearms. The law was so broad it would have permitted, in the absence of some special local regulation, carrying of concealed weapons in courthouses.



[W]e live in an era in which all sectors of the public are asking government agencies to be accountable, and I think that it's important that we define what it is that we're willing to be held accountable for as opposed to letting other people or the legislature or executive branch define what issues are important.

— Kevin S. Burke

Circuit Court in Miami, Florida, John Russonello, a pollster and consultant, Roy A. Schotland, professor of law at Georgetown University, and Robert Wessels, court manager for the county criminal courts at law in Harris County (Houston), Texas. The National Forum on Judicial Independence was supported by a generous grant from the Joyce Foundation of Chicago, Illinois.

**JUDGE MICHAEL W. MANNERS:** Mary [McQueen] said earlier that the word “activist” had become the “A” word when applied to judges. I can tell you I practiced law for 24 years and when I applied the “A” word to judges, I was talking about the body part and nothing to do with their political leanings, but times change. Times change.

Let me tell you, and Judge McAdam alluded to this earlier in talking about Missouri, the home of the nonpartisan merit

Many of us on the bench were not crazy about that aspect of it, but there were other constitutional challenges raised to that statute.

A judge in St. Louis City struck the law down as being unconstitutional and in violation of a particular section of the Missouri Constitution. It went up immediately by a special writ to the Missouri Supreme Court, and while the case was pending in the Missouri Supreme Court, 53 members of the House, all members of one particular political party that supported the legislation, introduced a resolution that would call for the popular election of members of the Missouri Supreme Court, the court of appeals, and those circuit judges, judges of general jurisdiction like me, who were appointed rather than elected.

Now, Judge Burke, how does that kind of legislation implicate judicial independence?

**JUDGE KEVIN BURKE:** For the soon-retired members of the Missouri Supreme Court, probably not very much.

I think there have been a number of instances around the country in which legislative bodies have been rather blatant in their attempt to intimidate or direct what the judiciary is doing, ranging from the federal court's jurisdiction-stripping bills. . . . [I]n my state Judge Rosebaum made comments to the House Judiciary Committee and incurred the wrath of the chairman of the committee, and he's been suffering from it ever since.

I think that some part of the reason that it has been so successful is that we in the judiciary and our natural allies—or unnatural allies—have not been very effective in speaking up against that or showing dangers to the public of that happening. I think that was the professor's comment, that it becomes the sport, the present-day sport, now: picking on judges. . . .

**JUDGE MANNERS:** Let's talk about judicial accountability for a minute because that has been posed as at once the opposite of judicial independence, but also the antidote to claims that we need to limit judicial independence.

Let me give you an example of a bill that was introduced in our legislature and if you have similar situations in your indi-

**JUDGE KEVIN BURKE:** I hate to tell you this, but Minnesota already has that law. It passed 20 years ago.

**JUDGE JEFFREY ROSINEK:** Is that a full literal rule or something?

**JUDGE BURKE:** It goes to our entire salary.

**JUDGE MANNERS:** The entire salary?

**JUDGE ROSINEK:** Well, apparently they keep them coming. I thought I was having problems . . . .

Absolutely. Absolutely. It's the Golden Rule and he who controls the gold rules, and that's the legislature, has the control of the dollars and if they were going to strip us of a meager thing like our health insurance, let alone our whole salary, I think that would cause us to act. Obviously, the major problem there is: Is that the right type of accountability to have?

Now we're supposed to have this concept of three coequal branches of the government. The only branch that thinks that way is the judicial branch, because I sure as hell don't believe that the executive or legislative branches believe that, but if the

[T]here is an institutional interest that the bar has . . . in having competent judges, and they are our natural allies and there's a lot more of them than there are of us. For the most part, a lot of us can't make political contributions. They can. They can influence their legislators in ways that we never can.

— Michael W. Manners



vidual states, I'd like to hear about it. But we had a bill introduced by a pretty good senator, one that I've known for a number of years, who had a complaint from one of her constituents about how long it was taking to get motions to modify decided in family court cases, so she came up with this solution. She introduced a bill that would have said that if a judge does not decide a motion to modify within 90 days after the evidence is completed, that judge would be stripped of his or her health-insurance benefits.

That is a form, I guess, of judicial accountability to make sure that we perform expeditiously. Judge Rosinek, would that make you perform expeditiously?

legislative branch would come up with some type of enactment like that, it would force judges to make [rulings on cases]. It doesn't mean they were ruled well. It just means they were ruled, and so that's the concern I have.

**JUDGE MANNERS:** Judge Burke, you wrote extensively about accountability in the article that is in the most recent *Court Review* on why accountability is a good thing and that we ought to welcome it.<sup>1</sup> Tell me, from a practical standpoint, for those of us who are in the trenches trying cases every day . . . , what does accountability mean for a trial judge?

#### Footnotes

1. See Kevin S. Burke, *A Judiciary That Is as Good as Its Promise: The*

*Best Strategy for Preserving Judicial Independence*, COURT REVIEW, Summer 2004, at 4.

**JUDGE BURKE:** I think the reason that I think it's important now is that we live in an era in which all sectors of the public are asking government agencies to be accountable, and I think that it's important that we define what it is that we're willing to be held accountable for as opposed to letting other people or the legislature or executive branch define what issues are important.

So put another way, if you're going to get run out of town, get it up front and announce it's a break, and I do believe that the judiciary, the trial court, does need to do that. I think there are some simple principles.

I think that even though I joke about not getting paid after 90 days, prompt disposition of cases is important. We can be held accountable for that, and we should be held accountable for that.

The thing I alluded to earlier . . . is I think that we should have courts, trial courts, that people feel that they were listened to. It's not that I'm overworked. It's that the effects of budget cuts are too many people coming in too fast through court and

**JUDGE BURKE:** Sure, there's a tension, but I remember going before the legislature right before the reapportionment decision came down and I presented our budget and what I told them was that there may be some delay in your getting your decision on reapportionment, so that's going to mean that you're going to have to decide which of two places you might have to live. We'll get a decision out shortly before the election, but it won't be too difficult for you to figure, generally speaking, where you're going to live.

And they looked at me like I was from the moon and I said, "No. Actually, we will get that decision out. It's a fifth-grade child who is not going to know which parent they're going to live with until the seventh grade. That's the effect of underfunding courts."

So I do think that people in the public and legislators can understand what it is that's at stake for people. Everybody understands in education that huge class sizes and social promotion have hurt kids. Why is it that they can't understand that huge courtrooms and social promotion of defendants into



I think term limits are probably one of the most ill-conceived ideas that we've come up with, and the reason I say that is in 2002 we had about a 65% change in the legislature in Missouri. . . . [T]here was an enormous amount of institutional history between our branches of government and within the legislature itself that suddenly evaporated.

— Michael L. Buenger

they're not being given an opportunity to be heard. If legislators understand the effect of their decision on simple principles, then I think we have a better chance of fighting these issues about judicial independence and budget.

**JUDGE MANNERS:** Is it practical, though, for that to occur? And maybe my state is unique in this regard. Let me know if some of you have this experience, but when I was on family court, which I was for the last two years, I was faced with a huge docket. Being able to make quick decisions would have been a luxury. I wish I could have done it, but the practical reality was I had a huge docket. I tried 590 contested divorces of one kind or another last year. Some of those were pretty simple cases. Others involved a lot of property, child-custody issues, things like that, that invited reflection on occasion and being able to listen to evidence and give people a complete hearing.

Isn't there an inherent tension between saying you have an arbitrary time standard that you have to meet and being able to give people the kind of attention that they deserve?

just recycling them isn't an unacceptable public policy?

So that goes back to my argument about accountability. I think that we have to have simple measures of accountability that the public can understand and that legislators can be forced to deal with because I think right now it's amorphous, and they can kind of get away with things—that you can do more with less when actually, in many instances, you can only do less with less.

**JUDGE MANNERS:** Judge DeLaughter, earlier today a lot of our focus has been on the current-day problems with judicial independence and the assaults on it, but some of our speakers reminded us today that this goes back to the founding of the republic, that there are long periods of time in our history when this has been a controversy, and through the nineteenth and early twentieth centuries.

Let me ask you about a practical problem, and I have no idea what the answer to this is, but you prosecuted a case in 1994 that had been tried once or twice before in 1964, 30 years earlier—a vastly different time than when you tried the case,

involving the prosecution of the man who allegedly—and I guess finally was proven to have—murdered Medgar Evers. In your review of that case, and I realize you were, what, in the third grade at the time that the case was originally tried, but what you know about the original trial of that case, how was judicial independence upheld at that time, in 1964 in Jackson, Mississippi?

**JUDGE BOBBY B. DeLAUGHTER:** Well, the very fact that there was a trial or two trials in 1964. We had a hard time in 1994, so you can imagine, given the times and given the setting, the pressure that would have been exerted upon the district attorney, for one player, not to prosecute the case, and the pressure on the trial judge in allowing the case to proceed on and various rulings that he was called upon to make during the course of the trial, so just the very fact that there was a trial, when you consider the times and the place, I think showed tremendous courage and independence involving the rule of law.

If the players involved strictly had been playing to accountability only, and every official in Mississippi is elected—judges, district attorney, everybody involved—if it was just accountability that was the primary concern, then you wouldn't have seen two trials.

**JUDGE MANNERS:** So maybe this isn't an intractable problem. If judges could withstand pressure in Jackson, Mississippi, in 1964 of that nature, maybe we can stand being called activist judges in 2004. Do you think that's possible?

**JUDGE DeLAUGHTER:** I think so.

**JUDGE MANNERS:** How does that square with public-opinion polls? I mean we just heard about a case that 40 years ago was tried in Jackson, Mississippi, by judges who had to be at least cognizant of the possibility that they were making unpopular decisions by even permitting a trial to take place. Does that give us some hope for the future of being able to shape public opinion, to recognize the importance of judicial independence?

**MR. JOHN RUSSONELLO:** The public has a strong commitment to an independent judiciary, but like its commitment to civil rights and the right to privacy and all the other rights that go along with the Bill of Rights, the application, sometimes they fall off in terms of how it's applied even though they're for the basic principles. So what we need to do, what the bar needs to do and the rest of us [as] advocates for the courts, is to give them the examples, the applications that reinforce the importance of judicial independence.

Your very first comment about the concealed-weapons legislation, which was a way to hurt the independence of the courts—an answer to that would not be this is going to hurt the independence of the courts. An answer to that would be to show to the bar, to show the motivation of the people who are bringing that particular piece of legislation.

In other words, when you get attacked it's better not to have to defend. It's better to show that the other side has motivations beyond judicial activism—that that's only a label, but they have another agenda as to why they're doing it, why they're proposing curbs on the courts' independence.

**JUDGE MANNERS:** Professor Feeley, I might follow up on that comment by pointing out that I don't think anybody who introduced that legislation would have said, well, we're doing this to try to focus the court on a particular path, but it is interesting the members of the same political party that introduced that also made sure—I shouldn't say made sure—that bill didn't go anywhere, and we have a contested governor's election coming up this year in which the political party in control of the governor's mansion may change so that the governor who appoints judges may be of the other party.

Does that validate your idea that as long as we have a strong two-party system, we will continue to have strong support for judicial independence?

**PROFESSOR MALCOLM FEELEY:** Well, my argument wasn't quite that strong. One of our problems is that our party system has weakened as well. We now have lots of prima donnas running on their own and running their own campaign and the party systems have declined, and so there's a certain virtue not only of building up the bar, but building up the party structure as well. But it does seem to me possible that candidates and leaders of the parties can sit down in advance of certain campaigns and try to structure the rules of the game that will proceed and to try to keep some things off the agenda. They can't always succeed, but it's probably an effort to start.

I think there's one other issue that's even more threatening to judicial independence, and some of you guys are going to participate in it, and that's the rent-a-judge movement. I think the rent-a-judge movement, to the extent that it takes off—and it has taken off here and is going to continue to take off in California—is going to allow the best and the brightest in the bar, particularly in commercial litigation, go to an alternative to the public courts, select a judge, often a retired judge, to decide the case and have a streamlined trial. And, as is the case in California, this can be a trial of record and if you don't like the outcome, you can go to the appellate court.

If it takes off, the judiciary is going to be the same way that public schools are in this state and lots of states. . . . Imagine if the best and the brightest of the bar opted out of concern with the public judiciary. We would be in a real big fix, and I think that's what's going to happen over the next few years. It's certainly a threat.

**JUDGE MANNERS:** Professor Schotland, you made a comment during your remarks about the purpose of a system or at least the purpose of judicial—and I'm paraphrasing and if I mess up your statement, I don't do so intentionally. Tell me if I'm wrong on this, but I believe your statement was that the function of judicial independence ought to be to ensure that the very best possible people want to be judges, want to go on the bench. Am I correct in that and is that one of the principal imperatives of judicial independence?

**PROFESSOR ROY A. SCHOTLAND:** That's certainly a happy amendment of what I said, which was actually the purpose of general reform is to get the best possible people to come to the bench and to stay on the bench, but I think judicial independence very slightly in that we're very concerned about the justice produced by the judges.

I'm just so struck by what was just said about 1964 and I was about to give you a note with a footnote from history. The Scottsboro case of the 1930s, the Scottsboro Boys, the United States Supreme Court overturned the verdicts of guilty and sent it back for retrial . . . and that judge was defeated the next time he was up, and I think there are times when you have to do what your judge in '64 did.<sup>2</sup> . . .

**JUDGE MANNERS:** Let me change gears a little bit, and I see my role as being as partially, at least, a devil's advocate. There is a school of thought that is that this whole concern about judicial independence is more an effort to try to cover up or insulate judges from valid, legitimate public criticism, and I know I'm not a perfect judge. The Court of Appeals has told me that on several occasions. I honestly try to do what I think is right, but I'm frequently wrong in my thoughts about that.

There are some members of our profession, and we all know of bad instances where judges have done things that are contrary to the Canons of Ethics, who do things that they shouldn't do, who maybe don't work the hours that they should and they get caught by members of the media. Is judicial independence simply a way to try to deflect valid criticism of judges? . . . .

**JUDGE ROSINEK:** No. I think that judicial independence is more than just making decisions. I think that along those same lines we have to have judicial accountability. If a judge decides to pay golf at eleven o'clock every single day, then that judge should be called a former judge because that individual destroys it for all of us.

I think independence is you have the independence in decision making and you have judicial independence as an institutional thing for retention selection, so you have lots of mechanisms of independence, lots of concerns for independence, but without accountability, then judicial independence dies.

We just cannot be a profession just to make decisions for ourselves or by ourselves. There will be, as you found out, somebody telling you that you made the wrong decision. I don't know if you really believe that, but at least they ruled last and you went along with it, whether you liked it or not. It doesn't make you less accountable, though, for what you have done. I think that you have to take both in mind. I think an individual judge has to have the independence of thought and the independence of processing, the independence of running his or her court, but also we must be accountable to what we do.

I think that judges should be thrown off the bench that do not follow. I think it's unfair for judges to spend three or four hours a day in their job while others are spending eight or ten hours a day. I think it's wrong for judges to get money when they're not performing and I think that accountability is impor-

tant, too, so I think that independence goes along with accountability.

**JUDGE MANNERS:** . . . Is there anybody in this room who has not seen some kind of exposé on television or read it in a newspaper about judge so-and-so who plays golf every day at eleven o'clock or something of that nature? We've sure seen them in our area of the country. Anybody who hasn't seen those kind of articles or TV programs, things of that nature?

Given that premise, let me tell you a concern I've got, and tell me how we can address this. You were talking about the importance of publicizing the good things that we do, and I think that is absolutely critical. I don't know that the media particularly cares about it, to be honest with you, but I can tell you for every good article there is out there about judges doing something or members of the bar doing something that's good, pro bono work, things of that nature, my impression is it's wiped out in a heartbeat when you have the kind of negative articles, the sensationalist TV programs that we see from time to time.

Can we counteract those with stories about good things that judges do and members of the judiciary in doing their duties?

**MR. RUSSONELLO:** Unfortunately, you may not like my answer, but this is the reality that exists: You can't do much about the bad stories about judges. They're going to always be there, and you can't get people, journalists, to do good stories, happy-faced stories about you and what you do every day. That's not what I meant. You're just going to have to live with that.

What you need to do is get the stories out about the importance of the courts, because the people believe the courts. If they're educated about the courts from high school, about the role that they play, and they believe that, that education is reinforced with stories that are newsworthy because they are stories about people who have been victimized by big institutions and they're controversial. They're not Pollyanna stories. They're not happy-faced stories. These are grim stories about people who got their water poisoned or were thrown out of their housing or other instances where the courts have done something to help somebody get justice.

It's not exactly about you, but that will help to reinforce what they learn about the importance of keeping the courts independent. You're still going to have to put up with the negative stories on judges, but they will have less meaning for people if people have a respect for the courts.

**JUDGE MANNERS:** Mike Buenger, I want to change gears a little bit. We spoke a little this morning about problems in dealing with the legislature in convincing them of the importance of judicial independence, and in your position you deal on a

2. For a review of the Scottsboro Boys case and the heroism of the judge who handled the retrial of the case, see Douglas O. Linder, *Without Fear or Favor: Judges James Edwin Horton and the Trial of the "Scottsboro Boys,"* 68 U.M.K.C. L. REV. 549 (2000); and Dan T. Carter, "Let Justice Be Done": *Public Passion and Judicial Courage in Modern Alabama,* 28 CUMB. L. REV. 533 (1997/1998). Judge James Edwin Horton, Jr. was assigned to handle the retrial because "he

was one of the most capable and highly regarded judges in the state." *Id.* at 556. He set aside a jury verdict of guilty—and punishment of the death penalty—after the retrial of one of the defendants as being contrary to the evidence. *Id.* at 557-59. Judge Horton drew two strong opponents in the next election and lost, receiving less than 20 percent of the vote. *Id.* at 559.

regular basis with people in our General Assembly in Missouri, correct? . . . And, I think, Bob, you and Larry, to one degree or another, deal with elected officials, lay people. . . .

And I don't know if this is true in your states or not. In Missouri, every year it seems like we have fewer lawyers in the legislature. Is the decreasing number of lawyers in the legislature a problem in being able to communicate with people about the importance of judicial independence?

**MR. MICHAEL L. BUENGER:** I think the issue of lawyers in the legislature cuts two ways. We have certainly seen in Missouri a decline in the number of lawyers in the legislature, and the defeat of what Judge Manners referred to, House Joint Resolution 50, that sought to undo the Missouri nonpartisan court plan, ultimately was set aside because of some of the lawyers in the legislature.

He decided, first of all, that he would issue a written opinion . . . . [H]e spent one and a half pages of that opinion explaining his role and the rule of law and why this was not a decision by one individual against majority rule. And he was overwhelmingly congratulated by every editorial board . . . .

– Mary Campbell McQueen

The flip side of it is in my experience, sometimes the lawyers in the legislature can prove to be as problematic as they can be helpful, and what I attribute that to is they are familiar with the system and they know what they want to change in the system, whereas oftentimes with lay people, if you sit down, you can at least have what I call an education session.

I have found with some lawyers in the legislature that the openness to understanding the judiciary from a larger perspective than “I try civil cases” or “I try criminal cases,” there isn't the openness to have that kind of education session. There isn't the openness to want to wrap one's mind around some of the issues that the branch of government faces, not a court in St. Louis or a court in Kansas City or a court in Joplin, but the branch, and so I certainly think that lawyers in the legislature can be helpful, but as with anything, it depends on who they are.

Barbara Tuchman, the historian, has a wonderful line when she says, “History is formed by personality,” and I think very much the relationship that the judiciary has with lawyer legislators or any legislator is a function of relationship and personality more than it is anything else.

I like to see lawyers in the legislature. I like to encourage that. Certainly our [bar] president before, our immediate past president, was very active in trying to get lawyers in the legis-

lature, but it's not a panacea. It's not a magic bullet. It doesn't solve all problems and, as I said, in certain circumstances they can prove to be more of a challenge than other legislators. . . .

**MR. ROBERT WESSELS:** I concur with what Mike said. That is exactly our experience and it goes to something that we talked about this morning, and that is it's all about relationships. It's all about understanding and understanding how courts impact the responsibilities of particular elected officials that you're dealing with [and] are interested in, and the time to meet them is not five minutes before the budget hearing begins or when there's a crisis. The time to start developing those relationships is months and years before, because sooner or later when the mechanics of the budget process are completed and the forms are filed and all of that is done, people have gone through the motions of the hearings.



Those of us involved in the process know that sooner or later it comes down to a visit between the presiding judge or the leadership judge, the court administrator in someone's office having a conversation about okay, what are we going to really do? What are the impacts? What are the implications of funding X program or Y or taking a cut? If you want us to take a cut, we don't want it, but let us decide where the cut is going to go. Don't go in and line-item it for us. Do you realize if you cut this, it's also going to impact you in three or four or five other areas?

Which means you have to know an awful lot about and be prepared to talk about how court operations impact other areas, particularly in social service and mental health, jail populations, prison populations, and those types of areas. . . .

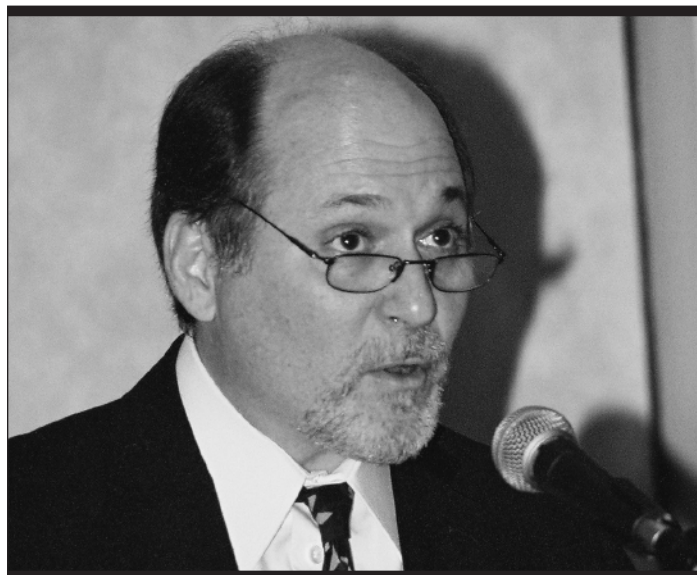
**JUDGE MANNERS:** How have term limits affected this?

**MR. BUENGER:** I think term limits are probably one of the most ill-conceived ideas that we've come up with, and the reason I say that is in 2002 we had about a 65% change in the legislature in Missouri. Somewhere in the neighborhood of a third of the Senate left and well over 60 percent of the House was term-limited out, and there was an enormous amount of institutional history between our branches of government and within the

legislature itself that suddenly evaporated.

No one knew why the budget process was the way it was, no one knew why the Judiciary Committee process was the way it was . . . [W]hat I saw in Missouri, a very young crop of people came in. Our appropriations chairman that handled the judiciary budget was 26 years old and quite literally got elected and then became chair of the Appropriations Committee.

And so to some extent, I think, going to what Bob said, the effect of term limits has been the destruction of relationships that for many years was the foundation by which government operated, and the effect of term limits and Missouri changing every eight years now leaves that whole area of relationships and processing history and procedure constantly in flux. There's no predictability to the process. You don't know who is in leadership this year and who is in leadership next year. Getting back to one of the other comments, the effect of that has, I think, been a lack of what I would term "party and legislative discipline." There is no more discipline in that particular body of government. It's a free-for-all and it's very difficult to work in that environment.



**JUDGE MANNERS:** Judge McAdam, we have all these problems. A lot of people say we're in a crisis in terms of the independence in one of our three coequal branches of government. What can AJA do about this? What's the magic plan? Do you have the silver bullet?

**JUDGE MICHAEL R. McADAM:** No, I do not. I do not have the silver bullet or a golden wand or a magic wand. Here's what I think AJA can and has started to do. First, what we did today is the beginning. I think that the process of going through the organization and planning on this day actually is a help also because what we've done is we've forged these links with other organizations and either the linkage was rather weak before or nonexistent, and so now we have relationships with the National Center. They're obviously stronger than they were before, even though they were strong before. We also have the relationship with the Joyce Foundation that we had never had before. We have the relationship with the Justice at Stake campaign that we mentioned throughout the course of the day.

These kinds of group inter-organizational, common-purpose kinds of activities I think are very helpful because that's the way you get the word out.

We don't have all the answers and sometimes people would say, as you kind of implied earlier, "You're talking about judicial independence, Judge, but that's just a cover for your areas and a cover for your golf game that you play every day or a cover for a bad decision that you made," and so coming from a judge, it may not have the impact that it would have if it came from what would be considered perhaps a more neutral source and a more respected source, quite frankly, and so I think those kind of linkages are very important.

The other thing that I was going to suggest, too, that we're also working on, and we hope to have this become a feature of our conferences and it's something that our president-elect, Gayle Nachtigal, has been working on for a long time, . . . is the judicial leader symposium.

What that is, it's kind of a high-fallutin' phrase, but what it really is talking about are presiding judges. Presiding judges are not trained to be presiding judges. Lord knows, judges aren't

You can't do much about the bad stories about judges. They're going to always be there . . . . What you need to do is get the stories out about the importance of the courts, because the people believe the courts . . . .

– John Russonello

trained to be judges unless they go to the Judicial College, and so a presiding judge is even less so, particularly when you consider that what they're being asked to do, as Bob and Larry have talked about, and Mike, deal with state legislators, deal with county legislators and executives, deal with mayors and city councils on issues of budgets that the average judge is not even worried about.

The only time I worried about the budget before I became presiding judge of my court was when my paycheck was a day late. Then it became a real big issue, but until then I never really gave it a second thought.

And so the leadership symposium. . . , and we hope to have it be a regular feature of our training program, is for presiding judges to get involved in these kind of ancillary issues that our legal training certainly doesn't prepare us for, but nonetheless, if we're going to be presiding judges or are presiding judges or hope to be presiding judges, then we would need to know these things and get this training.

So that's just two things I can think of off the top of my head,



but I really think that it's important that AJA, regardless of what tool it uses, that the AJA take a leadership role in this process. We have to become the voice of the judiciary in this country. I feel that we sometimes let our brothers and sisters—and the other big organization that we probably all belong to that's also a three-letter organization, that we've let them carry the load for us. And I feel that it's a great organization. I belong to the ABA, but the ABA is a lawyers' organization, and while we need to have relationships with lawyers, we still need to speak as judges, and I think that the AJA provides that vehicle, and my goal in starting this process was to reach that goal. That was what I had in mind. We're not going to get there yet, but we're getting there.

**JUDGE MANNERS:** All right. We've talked to you. We need to hear from you. We've talked about ways that the AJA can become more involved—Judge McAdam has, as president—but this is your organization ultimately, not just ours. What can we do for you to help you maximize judicial independence to prevent the decline in judicial independence? Let's hear from some of the people in the audience, either questions or comments about how about AJA can help you.

**JUDGE JOHN CONERY:** I'm John Conery from Louisiana. I want to know from Professor Feeley where I can get one of those rent-a-judges for a juvenile court.

I'll tell you basically that's a court problem and it will probably work itself out. It's a cycle. But certainly there's no demand for rent-a-judges in the domestic docket or criminal and juvenile work, as we all know.

But my question basically for the panel is in Louisiana, as in most of the country, Louisiana just passed an amendment to its constitution, a gay-rights amendment, which prohibited gay marriage. A courageous trial court judge in Louisiana declared the state statute unconstitutional. Ironically, it was a Republican judge from Baton Rouge, . . . and he was attacked and lambasted by those who were affected.

The particular amendment in Louisiana sought to do two things: ban gay marriage, plus it impacted civil unions. So the judge's decision was based on the fact that the constitutional amendment dealt with two issues instead of one and it should have been separate, separate constitutional amendments on each issue for the people to decide.

But in not responding to the attacks on the judge, we, as the Louisiana judiciary, seem to have dropped the ball. We're prohibited by our judicial commission from commenting on pending cases. The bar didn't step up to the plate. A lot of the things you talked about today, the weaknesses in our system, were demonstrated in that case. Here you have a judge with . . . a no-brainer constitutional problem, a two-issue thing but it was unconstitutional, being attacked.

And I hate to see what's going to happen to him, Judge DeLaughter, when he comes up for reelection unless this issue is handled properly.

So how do we respond? How do we get a rapid response, taking the ball and play? How is this thing handled the correct way? Perhaps the public-relations person or Professor Feeley or others might have some suggestions.

**MS. MARY CAMPBELL McQUEEN:** I just want to give you an example of a similar type of case that happened in Washington State with an absolutely opposite response, and I think as judges you have an opportunity, and I think Judge Burke has said this over and over again, for the people that appear before you to understand why you make decisions.

Similar issue, different topic. Subject matter was tax reform. The initiative that was on the ballot in Washington State passed overwhelmingly, close to 70 percent of the vote, as I recall. The issue came up before a trial court judge in Seattle, which is King County, so he decided, first of all, that he would issue a written opinion, which sometimes I think as trial judges you don't consider, but even if [it] had been an oral opinion, he spent one and a half pages of that opinion explaining his role and the rule of law and why this was not a decision by one individual against majority rule.

And he was overwhelmingly congratulated by every editorial board, got probably every best-judge-of-the-year award I think that any group in Washington could take, and had a television interview on two of the local national affiliates explaining that in the judiciary we are the only branch of government that has an institutionalized review process, and so in this situation where it was the same issue, single issue versus multiple issue, [which] was the reason it was stricken down in Washington, he explained why that was not his decision as an individual judge and pointed out as to why he made his decision.

And so I think you as judges can be some of the best advocates. I think what Judge Burke was trying to say is rather than wave the standard of judicial independence, explain what this means to a fifth-grade child if this type of legislation or this intrusion into the discretion of judges passes.

When I speak to high-school groups and they say, "Well, what makes a good lawyer?" one of the things I tell them is you have to be a good storyteller because when you get before a jury, it's about telling a story and having people do something that they might not personally want to do but are compelled to do because of the rule of law, and I think what we have to do are take these issues that come up that attack judicial independence and turn them into real live personal stories that this is how it's going to affect you. Judicial independence isn't just a concept that the framers of the Constitution thought up. It has real implications for the public today.

And even though we've talked about today all the gloom and doom and the lack of respect of the judiciary, the judiciary is still held in higher esteem than any other branch of government. People still view you as the truth finders, the seekers of the truth, and so I think as judges when you speak to civic organizations or classrooms or from the bench, you're the ones who can tell that story best.

**MR. RUSSONELLO:** I would strongly encourage you to get a copy of those interviews that Mary mentioned. I've seen them, and this judge was brilliant in his interview with the press because he never talked about the merits of what he decided. He talked about the process and he was brilliant in those interviews, and so I think that certainly given the fact that it was the same exact issue, it was single subject, putting two things in a referendum, I would encourage you to get that . . .

**JUDGE MANNERS:** Who else has questions or comments?

JUDGE WILLIAM O. ISENHOUR, JR.: I'm from Kansas, and as I've sat here all day today, I think this has been a wonderful experience for us, but I wonder if we're doing a lot of preaching to the choir here. I don't think anybody here has to be convinced about the importance of the topic that we're talking about.

My question is where does the AJA go from here and how do we reach out to other segments of the community? Do we include bar associations in forums like this? Do we invite members of the media to forums like this? Do we invite those politicians that like to complain about activist judges? Do we maybe even invite the cowboy that's in the White House right now?

I think just to persuade ourselves is only the first step. I'm fired up and I'm excited from today's forum, but I think we need to have a plan to go from here. . . .

**JUDGE McADAM:** Bill, an excellent question, and here's what I have in mind. First of all, the program that we're going to tape tomorrow . . . that will appear on *Inside the Law*, . . . probably next spring, early summer. This will actually be on television, on PBS. So the first thing I can tell you is that the result of that program will have some kind of a national ripple effect. It may be minimal at first, but it's going to have some kind of an effect and some kind of impact.

Now the other thing that we need to do is not rest on our laurels. That's not the end product, at least not that I had in mind. What I have in mind, and I think the leadership of the AJA that will follow me is in agreement on this, and that is that we need to pursue a relationship with, and you mentioned bar associations.

I think that's the next logical step, is to get involved, to maybe have a summit meeting that the AJA sponsors and hosts maybe within the next six months or year, using the program as kind of an introductory card to invite commentary, to invite the various national bar associations such as the ABA, obviously, but also ATLA, the criminal defense lawyers and the prosecutors, and come up with group strategies, and we can expand that to other organizations that are more segmented, such as the National Association of Women Judges. I say that because I see their president, Judge Thompson, still sitting here and participating. . . .

And so I think that is something we can do, and I think then we gain strength by having more disciplines in this process, but we also have to, as judges, control the process. As I said earlier, we can't have lawyers telling the courts how to operate, but we can have the bar association provide some amount of educational function that doesn't appear to be, as I said earlier, defensive, because if it comes from us, it will appear to be that way. It's got to be a positive thing.

I've been on the negative side. Trust me. I was attacked last year when I got back from Montreal with an article about my court that was like a kick in the gut, and some of it was deserved and some of it wasn't, and of course the part that wasn't was emphasized, and this is life. This is the way it is. But what I learned from it was you can't be negative about your reaction and your response. You have to be positive. A negative reaction only causes people to think that you really are as bad as the paper said you were, and of course that's not true,

at least in most cases, and the one that we were involved in with our court—it wasn't just me, but our court—it was not true.

So that's the best I can come up with, Bill, but I think pursuing some kind of a summit meeting with bar associations is the next logical step for us to take.

**JUDGE ROSINEK:** I have a comment I'd like to make on that, too. I think there is another avenue that we could take, and I think it's a future avenue. Every year millions of high-school kids learn about the Supreme Court. They learn about the federal courts. They do not learn anything about the state courts. Ninety-seven percent of all the cases that are heard each year happen in state courts. These kids will be affected more by their municipal court, the traffic court, a divorce court, than they will by Supreme Court decisions. I think what we can do, there are organizations, and we did some years ago, but I think what we can do, too, is to take this message maybe on a more simplified basis and bring it to the high schools.

All of us have to be advocates. All of us can go back to our communities and become advocates for what we do every single day. We don't have to give a decision, we don't have to discuss decisions, but we can talk about the process, "What is that process?" so that people feel more comfortable, so as kids go on from high school to college and they are voting, then they understand the concepts that we deal with every single day, and I think it behooves us to get involved on that level, not only work with our peers, which is sort of a bit easier than working with . . . middle-school or high-school kids, but I think that we have to do that to get our message across. If we do not get our message across to those kids, then we'll never get our message across to the next generation of voters, our next generation of lawyers, our next generation of judges.

**JUDGE BURKE:** I think that before you go to the Rotary Club, you ought to go to your own employees. I think there are a huge number of employees around the country, and I had an experience at the time that O.J. Simpson was tried. I had given a number of talks around the country and so I asked people, "Have your neighbors asked you about what Lance Ito was doing?" And every single court employee everywhere in the country raised their hand. Even though they were a probate clerk in Falls River, Massachusetts, their neighbor knew they worked in court and so they had some belief that somehow that person knew what Lance Ito was doing.

And so I think before we go out to the Rotary Club and all the other good things we should do, it's about making sure that we have organizational lessons in your court, that your own court employees know what's at stake and that they're engaged in that, because when you make a mistake or I make a mistake, which we will, I want that court employee to say Kevin Burke cares about what's going on in this courthouse and give me the benefit of the doubt when they're at their Rotary Club or they're at their church or they're at whatever event. They will absolutely be asked about what's going on, and I think in some instances judges have not used that base of a large number of employees who either can become allies or bystanders in making sure that the judiciary is supported by the public.

**JUDGE MANNERS:** I'd like, if I may, to amplify on something that Judge McAdam said, and that is the importance of reaching out to the Bar. I can tell you I practiced law for 24 years as a trial lawyer and I tried cases in front of all kinds of judges, some good, some bad, and obviously I was an advocate for my client and I wanted to win, and so if I had judges who viewed things the way I did, you know I was always pleased with that, but, quite frankly, that didn't happen very often. And what I really would be pleased and satisfied with—and I think most trial lawyers would, too—is a judge who is competent, who is going to be fair, who is going to listen to both sides, and there is an institutional interest that the bar has, both the defense bar and the plaintiffs' bar and the criminal bar and all other kinds of bars, in having competent judges, and they are our natural allies and there's a lot more of them than there are of us. For the most part, a lot of us can't make political contributions. They can. They can influence their legislators in ways that we never can.

So when Judge McAdam says we need to reach out to all segments of the bar, that is absolutely true because it is in their interests to see to it that judicial independence is protected. Otherwise, you're not going to have the best and brightest on the bench. . . .

I think that judicial independence is more than just making decisions. I think that along those same lines we have to have judicial accountability. If a judge decides to pay golf at eleven o'clock every single day, then that judge should be called a former judge because that individual destroys it for all of us.

—Jeffrey Rosinek

*Malcolm Feeley is professor of law at the Boalt Hall School of Law at the University of California-Berkeley and the author of several books about the court system.*

*Michael R. McAdam is a judge and former presiding judge on the Kansas City (Mo.) Municipal Court. He served as president of the American Judges Association in 2003-2004 and organized the National Forum on Judicial Independence.*

*Mary Campbell McQueen is president of the National Center for State Courts. Previously, she served as the state court administrator in Washington for 16 years.*

*Jeffrey Rosinek is a circuit judge on the Miami-Dade County Circuit Court in Florida. He is a past president of the American Judges Association.*

*John Russonello is a partner in the public-opinion research firm Belden, Russonello & Stewart in Washington, D.C. He does public-opinion research, polling, and focus-group studies for various groups on topics related to the judiciary and judicial independence. Roy A. Schotland is professor of law at Georgetown University in*



*Michael W. Manners is a circuit judge on the Jackson County Circuit Court in Independence, Missouri. While a trial lawyer for 24 years before taking the bench, he was president of the Eastern Jackson County Bar Association and the Missouri Trial Lawyers Association.*

*Michael L. Buenger is the state court administrator in Missouri. He is a past president of the Conference of State Court Administrators.*

*Kevin S. Burke is a district judge and past chief judge of the Hennepin County District Court in Minneapolis, Minnesota. He received the 2003 William H. Rehnquist Award for Judicial Excellence from the National Center for State Courts.*

*Bobby B. DeLaughter is a circuit judge on the Hinds County Circuit Court in Jackson, Mississippi. A former district attorney and past president of the Mississippi Prosecutor's Association, he handled the 1994 prosecution of Byron De La Beckwith for the 1963 murder of Medgar Evers, a case portrayed in the movie, Ghosts of Mississippi.*

*Washington, D.C. He is an expert on judicial selection, including elections, and teaches courses on administrative law, campaign finance, constitutional law, and election law.*

*Robert Wessels has served since 1976 as the court manager for the county criminal courts at law in Harris County (Houston), Texas. He is a past president of the National Association for Court Management.*